FILED

93 1754 MAY 3 1994

OFFICE OF THE CLERK

Docket No. _____

IN THE

Supreme Court of the United States

October Term, 1994

ARDSHIRE DANESHMAND,

Petitioner/Appellant,

v.

R. B. HAZARD, INC., CENTRAL FENCE OF CNY, INC. and THOMAS DeSANTIS, JR. T/A FENCE WORLD,

Respondents/Appellees.

PETITION FOR WRIT OF CERTIORARI

Stephen Merrill, Attorney
2019 Llewellyn Avenue
Norfolk, Virginia 23517
(804) 623-4200

Counsel for Petitioner

James C. McCaa, III
TAYLOR & WALKER, P.C
Suite 400, City Centre Building
223 East City Hall Avenue
Post Office Box 3490
Norfolk, Virginia 23514
(804) 625-7300

Stephen R. Jackson
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, Virginia 23510
(804) 628-5500

Benjamin P. Lynch, Jr.
HARRIS, FEARS, DAVIS, LYNCH & McDANIEL
5735 Poplar Hall Drive
Post Office Box 12756
Norfolk, Virginia 23502
(804) 461-4100

Peter C. Manson, Jr.
PENDER & COWARD, P.C.
Fourth Floor, Greenwich Centre
192 Ballard Court
Virginia Beach, Virginia 23462
(804) 490-6264

Counsel for Respondents

QUESTION PRESENTED FOR REVIEW

(1) Whether the law of the 50 states or the ``federal common law'' is controlling in federal diversity of citizenship cases in determining whether the plaintiff's evidence in a negligence suit is sufficient to raise a factual issue of proximate causation?

(2) Whether the directing of verdicts without jury findings, as affirmed by the federal appeals court under the facts and circumstances of this case, is consistent with the Seventh Amendment right to a jury trial in civil cases? Specifically, can the federal courts properly dismiss from jury determination competing theories of an accident's cause that were admittedly raised by the evidence in a products liability suit?

(3) Whether the United States Fourth Circuit Court of Appeal's Internal Operating Rules 36.4, 36.5 and 36.6 directing that certain decisions of that court are not to be widely distributed and do not fully operate as binding legal precedent in future cases (as those internal working rules were applied by the Fourth Circuit in this case) are consistent with constitutional requirements for due process of law and for equal protection for all citizens under the law in the rendering of judicial decisions?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

LEGAL AUTHORITIES IN ISSUE 2

STATEMENT OF THE CASE 8

ARGUMENT 20

I. STATE LAW IS CONTROLLING IN DETERMINING THE SUFFICIENCY OF EVIDENCE IN A DIVERSITY OF CITIZENSHIP CASE 20

II. THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY 23

III. RULES OF COURT WHICH SUBSTANTIALLY RESTRICT THE STARE DECISIS EFFECT OF DECISIONS ISSUED BY THE COURT VIOLATE CONSTITUTIONAL GUARANTIES TO DUE PROCESS OF LAW AND TO THE EQUAL PROTECTION OF LAW.... 29

CONCLUSION 33

CERTIFICATE 35

TABLE OF AUTHORITIES

Amendment VII of the United States Constitution 2, 34

Amendment XIV of the United States Constitution 2, 19, 22, 23, 24, 34

Board of Educ. v. McCloskey, 458 U.S. 970 (1982) 31

Board of Educ. v. Rowley, 458 U.S. 176 (1982)..... 31

Constitution of the Commonwealth of Virginia, Article 1 Section 11 ..... 3, 22

County of Los Angeles v. Kling, 474 U.S. 936 (1985) 31

Dowden v. Polymer Raymond, Inc., 966 F.2d 1206 (7th Cir. 1992) 21

Erie v. Tompkins, 304 U.S. 64, 56 Sup. Ct. 817, 82 L. Ed. 1188 (1938) 21

Gunning v. Cooley, 281 U.S. 90 (1929) 25

Hazard v. Panco, 240 Va. 438, 397 S.E.2d 866 (1990) 16, 22

Howard v. McCrory Corp., 601 F.2d 133, 4th Cir. 1979) 28

Liteky v. United States, 510 U.S. _____ (1994) 34

Little v. Liquid Air Corp., 952 F.2d 841 (5th Cir. 1992) 21

Moore v. Carolina Power and Light Co., 537 F.2d 1252 (4th Cir. 1976) 29

Mays v. Pioneer Lumber Corporation, 502 F.2d 106 (4th Cir. 1974) 29

N. J. Scavens v. Macks Stores, Inc., 577 F.2d (4th Cir. 1978) 29

Old Dominion Trans. Co. v. Hamilton, 146 Va. 594, 131 S.E. 850 (1926) 22

Parks v. Ross, 11 How. 362 (1850) 24

Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1944) 26

United States Fourth Circuit Court of Appeals Internal Operating Rules 36.4, 36.5, 36.6 ..... 20, 30

Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061 (1969)..... 21, 28

United States Supreme Court Rule 17 35

OPINIONS BELOW

The January 10, 1994 unpublished opinion of the Fourth Circuit United States Court of Appeals sought to be reviewed is reprinted in the Appendix to this petition. (1A.) The Fourth Circuit's Order Of February 2, 1994 denying Daneshmand's Petition for Reconsideration with Suggestion for a Hearing En Banc also appears in the Appendix. (24A.) The oral ruling granting directed verdicts for the defendants at trial rendered by the United States District Court for the Eastern District of Virginia on June 16, 1992 is also reprinted in the Appendix. (26A.)

JURISDICTION

The jurisdiction of this Court in reviewing this petition vests under 28 USC Section 1254(1). The case was brought in federal district court under diversity of

citizenship jurisdiction. 28 U.S.C. Section 1332.

LEGAL AUTHORITIES IN ISSUE

AMENDMENT VII OF THE UNITED STATES CONSTITUTION -CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

.....

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA, ARTICLE 1 SECTION 11. DUE PROCESS OF LAW OBLIGATION OF CONTRACTS; TAKING OF PRIVATE PROPERTY; PROHIBITED DISCRIMINATION; JURY TRIAL IN CIVIL CASES.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby

private property shall be taken or damaged for public uses, without just compensation, the term ``public uses'' to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

36.4. Publication of Decisions.

Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains a historical review of a legal rule that is not duplicative; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

36.5. Unpublished Dispositions.

Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Any individual or institution may receive copies of all published opinions of the Court by paying annual subscription fee for this service. In addition, copies of all published opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrate judges, clerks of district court, United States Attorneys, and Federal Public Defenders upon request. All published and unpublished opinions are available on EDOS,

the Court's Electronic Bulletin Board System, for 30 days after issuance. The federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of unpublished opinions are retained in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

36.6. Citation of Unpublished Dispositions.

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is

disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

STATEMENT OF THE CASE

Daneshmand appeals from the Fourth Circuit Court of Appeals three judge panel opinion dismissing his products liability

suit on the ground his trial evidence did not create a jury question of proximate causation.

In January, 1986 Army Specialist Four Ardeshir Daneshmand's lower back was injured when a newly-built, seven foot tall, forty foot long, rolling gate collapsed on top of him as he was attempting to close the gate with the help of another soldier. Just three months earlier, a nearly identical rolling gate built by the same contractors at the Fort Story project had also collapsed while being opened by an unsuspecting soldier. That accident permanently injured Army Sergeant John Panco. Both soldiers were discharged from the Army due to their injuries.

The gates that collapsed were built under the supervision and approval of the prime contractor for the entire Fort Story

hovercraft facility; R.B. Hazard, Inc. Central Fence of CNY, Inc. was the subcontractor hired by R.B. Hazard, Inc. to draw, fabricate and install the gates. Thomas DeSantis was subcontracted by Central Fence to install the gates.

Daneshmand and Sergeant Panco brought separate products liability suits against those contractors seeking compensation for their injuries. During investigation of the cases it was learned that the basic design for these long, heavy cantilever gates was entirely inappropriate and unworkable. The single frame design employed could not possibly withstand the massive weight pressures involved in moving the gates to the opened and the closed positions along the two upper and two lower rollers that would hold the gate aloft. The weight of such a

large gate would invariably force the top rollers to be pushed upward and the bottom rollers downward as the weight of the gate shifted (cantilevered) from one upper and lower roller to the other upper and lower pair of rollers. Because of this basic design defect, all of the gates built at Fort Story were destined to lock into position routinely under ordinary use and eventually, with continued use, to fall down entirely.

Based on his review of the Army Corps of Engineers drawing, Norfolk fencing contractor, Mr. George Stenke, had identified this fatal design defect to the prime contractor's superintendent for the project and recommended that the Corps of Engineers be informed of the problem. Only a twin-frame (known as boxbeam) design would be at all workable for such unusually large gates

under industry standards, Mr. Stenke maintained to Hazard. Mr. Stenke's advice was rejected. Hazard instead hired Central Fence to build the gates as drawn.

During the installation of the Panco and Daneshmand gates, Mr. DeSantis encountered a number of alarming problems. The bottom tires supporting the gates on the outside end would break off under the weight of the gates. The tires on the inside end of the gates would hang uselessly in the air during the critical juncture of operation. Consequently, the tires failed to provide any of the partial weight bearing support they were intended to bear. As should have been expected, the supporting rollers on both gates were repeatedly pushed out of position causing the gates to jam during operation. By the time of the completion of the Panco gate, DeSantis' feeling was ``I hung these

gates. They are unsafe. I put them up not wanting to.''

In order to keep the gates operating, DeSantis would routinely, in his word, ``adjust'' the gate rollers. This involved hitting the rollers with a hammer until they were displaced from one another even further. This permitted the gates to roll once again. DeSantis recommended the same method to the Fort Story maintenance department. These ``adjustments'' brought ever closer the day when the gates would fall to the ground while in operation.

The Army did not conduct a formal investigation of the Panco accident. The police reports and trial testimony concerning the accident showed that the gate, in fact, had fallen twice on the morning of October 17, 1985; first onto the hood of a soldier's car and later onto Sergeant Panco's foot. By

who and how the gate had been rehung between falls never was shown in Panco's case or in this case by anyone. There is no eyewitness testimony in either record concerning the Panco gate's exact condition immediately before or after either fall.

Following the Daneshmand accident an investigation was conducted by the Corps of Engineers on behalf of the Fort Story commander. An inspection of the fallen gate the day after the accident showed that one of the gate rollers had been entirely dislodged. This was attributed by the investigators to the affixing of an electrical ground wire by a Hazard subcontractor some six days earlier on the frame post supporting the displaced roller. The investigation also fixed blame on the absence of a gate stop on the outside top corner of the gate frame.

Since the gate was being closed rather

than opened at the time of the Daneshmand accident, the absence of the gate stop (though gross negligence by DeSantis) did not, in fact, possibly cause the gate to fall. The other hypothesis for the gate's collapse found during the Army investigation also proved invalid. Professor Timothy Scott of the University of Virginia engineering faculty testified at Daneshmand's trial that the affixing of the electric ground wire to the fence post had no effect whatever on the gate's stability and that the movement of one of the gate rollers, standing alone, would not permit the gate to fall down. The gate actually falling over could not have happened if three rollers remained intact. 1 The Army

---

1 Professor Scott's conclusion about the ground wire's effect was no where mentioned in the panel opinion, though quoted at brief. Neither was DeSantis' method for ``adjusting'' the gates when they jammed in place.

engineers working on the project never did learn of the basic design defect in the gates until interviewed for the civil trials.

All ten of the Fort Story gates became entirely inoperable within two years of their installation. Unable to solicit an offer to repair or rework the gates, the Army Corps of Engineers eventually contracted for the installation of boxbeam gates.

Sergeant Panco's case came to trial first. A Virginia Beach Circuit Court jury awarded him $250,000 in damages against Hazard. A subsequent appeal of that verdict ended with unanimous affirmance by the Virginia Supreme Court. Hazard v. Panco, 240 Va. 438, 397 S.E.2d 866 (1990).

At Daneshmand's trial, he called two fellow soldiers to testify who had been witnesses to the accident and who also recounted the constant difficulty soldiers

had dealt with in making the gate in question open and close. Mr. Stenke testified about his evaluation of the gate's design inadequacies and about what he had told Hazard about the fatal design defect. Professor Scott and Mr. Bretz with unequivocal certainty found the cause of the accident to be the improper design of the gates aggravated by the shoddy materials supplied by Hazard and by DeSantis' poor workmanship. The Army engineers testified about their supervision of the project, including the fact they were never told of the fatal design defect.

After considering the contractors' joint motions for directed verdicts under Federal Rule of Civil Procedure 50(a) at the close of the plaintiff's evidence, the district court, in one of the more astounding rulings ever issued by a federal court in the modern era,

granted the motions dismissing Daneshmand's case against all of the defendants finding insufficient proof of negligence or causation and holding that the law of warranty had no application whatever to the case. The authority cited in support of the district court oral opinion had little, if any, relevance to the stark negligence and warranty issues shown by Daneshmand's evidence. (26A. - 78A.) 2

After lengthy consideration, a Fourth Circuit panel (incredibly) affirmed the district court decision. Studiously avoiding

---

2 The issue of causation was addressed in the district court opinion with but a few observations. (62A to 65A.) Only three pages were devoted to the issue in the appellees' brief below. That brief did not articulate any of the reasoning later contained in the panel opinion. The issue of proximate causation was not raised in any way by the appeals court panel's questions during oral argument below.

most of the district court's holdings, the panel opinion focused on the issue of proximate causation of the accident. Despite Daneshmand's overwhelming proof of causation, the opinion reasoned that no rational juror could have concluded that the Fort Story gates' inherent design defect and poor construction caused the Daneshmend gate to fall. The opinion posited two alternative theories of causation and pointed out that the Fourth Circuit has historically applied a ``stringent standard ... [in proving] ..... causation....''. The opinion concluded that, since the evidence of causation lacked ``substantial probability'', it was mere ``surmise and conjecture''. (9A - 10A.) On that basis, Daneshmand was denied his right to a jury decision under the Seventh Amendment to the Constitution.

And the Fourth Circuit decision also

denied Daneshmand his right to due process of law and to the equal protection of law through the way the appeals court panel chose to issue this bold ruling. Under the Fourth Circuit rules the opinion below was categorized as unpublished, uncitable, hardly findable and, therefore, non-existent except to the parties to the case. United States Fourth Circuit Court of Appeals Internal Operating Procedures 36.4, 36.5 and 36.6, set out above.

ARGUMENT

I. STATE LAW IS CONTROLLING IN DETERMINING THE SUFFICIENCY OF EVIDENCE IN A DIVERSITY OF CITIZENSHIP CASE.

At the first stage of analysis, this case raises an important issue of federal law in connection with directed verdicts in federal diversity of citizenship cases.

It has long been the law in diversity of citizenship cases that state law applies to substantive issues and federal law applies to issues of legal procedure. Erie v. Tompkins, 304 U.S. 64 (1938). As students of the issue quickly discover, though, that theoretical distinction is often of little use in determining choice of law.

In this case, the Fourth Circuit applied its long-held choice of law rule applying federal common law. Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061 (1969). Other federal circuits, however, have adopted the opposite view. Dowden v. Polymer Raymond, Inc., 966, F.2d 1206 (7th Cir. 1992) and Little v. Liquid Air Corp., 952 F.2d 841 (5th Cir. 1992). The arguments for both positions often devolve more into semantics rather than convincing analysis. The distinction, though, is crucial to this case because of the

special character of Virginia law on this issue and because of the Hazard v. Panco Virginia decision that preceded Daneshmand's trial.

With the right to a jury trial in a civil case held ``sacred'' by a provision of the state constitution (set out above), Virginia common law has confined directed verdicts to those cases not ``producing a scintilla of evidence'' in support of an essential element of proof. Old Dominion Trans. Co. v. Hamilton, 146 Va. 594, 131 S.E. 850 (1926). Quite different from Virginia law, the Fourth Circuit in this case explicitly applied a ``stringent [federal law] standard'' in assessing the proof of causation. (9A.)

Sergeant John Panco's case was decided under Virginia law. Panco's proof of causation in his accident was far weaker than Daneshmand's proof was. Yet, the Virginia

Supreme Court dismissed the contractors' causation argument with just a few passages in the Panco decision. The same thinking would plainly apply under Virginia law to the more specious arguments on causation advanced in this case.

II. THE PETITIONER WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY

The Seventh Amendment preserved the citizens' right to a jury trial in the kinds of cases and issues that colonial and early American courts had historically called juries to decide. The right to trial by jury in a negligence suit was protected under American law both before and after the passage of the Bill of Rights.

To reach its conclusion on causation, the appeals court analyzes two alternatives to the obvious conclusion that Daneshmand's gate fell due to its inadequate design and

the poor workmanship and materials used. One alternative theorized is the alleged ``abuse'' of the gates by soldiers. The other is the fact an electrical ground wire had been attached to the gate post. Both theories find support in the record almost solely from the dubious testimony of the gate installer; Mr. DeSantis. His testimony at trial had been directly impeached nine times. Other testimony had shown both theories to be bogus. Yet the appeals court found the competing theories of causation to be equally convincing and therefore did not permit the jury to make its own evaluation of what caused the Daneshmand accident.

This reasoning flies in the face of all precedent under the Seventh Amendment.

This Court first approved the general procedure now in practice for directed verdicts in Parks v. Ross, 11 How. 362

(1850). The trial court had instructed the jury to hold in favor of the defendant; a directed verdict rather than a risky demurrer to the evidence as at English common law. The Parks court found there to be no significant difference between the two.

The next inroad on the power of American juries to weigh evidence and determine facts, the ``substantial evidence'' rule, met with constitutional approval eighty years later in Gunning v. Cooley, 281 U.S. 90 (1929). In affirming a jury verdict in favor of the patient in a medical malpractice suit, the Court reached out to pronounce:

``Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.'' (Id, at 94.)

But even in Gunning, the Court's

analysis of the proximate cause issue permitted the jury wide latitude in reaching its verdict. The opinion approved a finding that the physician had mistakenly placed acid in the patient's ear despite an absence of acid induced scar tissue in the patient's ear canal.

The definition of ``substantial evidence'' remained rather liberal in Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1944). In that case, the family of a railroad worker brought a wrongful death claim against a railroad. The jury awarded the decedent's estate a verdict. The central weakness in the plaintiff's evidence was the absence of an eyewitness account to show exactly where and in what way the decedent was working in the moments before he was crushed by a moving rail car. Evaluating the range of possibilities, a court of appeals

decision directed a judgment for the railroad on the issue of causation. Central to the issue in this case, the Court observed:

> ``It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.
>
> [The jury] weighs the contradictory evidence and inferences, judges and draws the ultimate conclusion as to the facts.'' Id at 35.

In the decision below in this case, the appeals court, in effect, overruled the reasoning and results contained in the few Seventh Amendment cases this Court has reviewed. In its rationale and findings, the appeals court opinion asserts that judges have the authority to evaluate the trial evidence on its merits to determine whether a jury verdict could be supported in light of, in a judge's view, which factual inferences

are more or less likely. The appeals court cites in support of its startling analysis four of it's own previous cases. The leading decision cited entirely contradicts the reasoning and result found in this case. Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061 (1969). The balance involve evidentiary records bearing no relation whatever to the state of the evidence in this record. To draw from these cases the general principle that federal procedure has ``a stringent standard'' in proving prima facie causation, certainly would have surprised the judges who wrote that the Wratchford line of cases applied a ``liberal rule'' and then followed it. Howard v. McCrory Corp., 601 F.2d 133, at 137 (4th Cir. 1979). The ``stringent standard'' and ``substantial probability'' test expressed in this case is one that has never been applied in this

way (or in any way close to it) in any federal appeals court opinions counsel has located. Fourth Circuit decisions that contradict this panel opinion are numerous. N. J. Scavens v. Macks Stores, Inc., 577 F2.d (4th Cir. 1978), Mays v. Pioneer Lumber Corporation, 502 F.2d 106 (4th Cir. 1974), and Moore v. Carolina Power and Light Co., 537 F.2d 1252 (4th Cir. 1976).

III. RULES OF COURT WHICH SUBSTANTIALLY RESTRICT THE AVAILABILITY AND STARE DECISIS EFFECT OF DECISIONS ISSUED BY THE COURT VIOLATE CONSTITUTIONAL GUARANTIES TO DUE PROCESS OF LAW AND TO THE EQUAL PROTECTION OF THE LAWS.

The remaining issue in this case of great importance to constitutional law is the way the appeals court chose to distribute this entirely novel decision; through an unpublished opinion.

The Fourth Circuit's internal rules set out above direct that opinions of the court will be unpublished and very narrowly distributed unless the decision adds to the body of existing law. The first page of the panel opinion issued in this case flatly states: ``Unpublished opinions are not binding precedent in this circuit.'' (3A.)

Opinions are unpublished in order to grant judges greater license in writing noncontroversial opinions and to eliminate the costs of full publication where possible. The rationale of the no citation rule is that it levels the playing field between those parties who can afford the cost and effort of locating unpublished appellate opinions and those parties who cannot. See ``Unfairness and Access to and Citation of Unpublished Federal Court Decisions'', 18 Goldengate University Law Review 277 (Summer 1988).

Most of the federal circuits have now adopted some variant of the no citation rule with unpublished opinions.

The problem with this practice is threefold. First, it allows federal judges to decide just how important their own decisions are. It has occurred more than once in this Court for an unpublished court of appeals decision to be fully reviewed and reversed. Board of Educ. v. McCloskey, 458 U.S. 970 (1982), Board of Educ. v. Rowley, 458 U.S. 176 (1982), County of Los Angeles v. Kling, 474 U.S. 936 (1985).

The second weakness is the way limited distribution of opinions undermine the principle that court proceedings of all kinds be public and subject to scrutiny. In the Fourth Circuit, unpublished opinions are made easily accessible to the public for only a thirty day period after their issuance and

only on one reference list. The sharp movement away from all appeals court decisions being readily accessible to counsel and to the public smacks of secretive decision making.

Finally, the no citation rule in combination with limited distribution of unpublished decisions opens a gaping opportunity for federal courts to disregard controlling precedent in a particular case yet never have to address the stare decisis effect such a decision would have in future cases. If the reasoning in the Daneshmand panel decision below, for example, were actually followed, products liability suits and most other negligence cases would be virtually barred in the federal courts within the Fourth Circuit. If Daneshmand's evidence of causation was not enough to raise a jury issue, it is unlikely the evidence remaining

from crashed planes and automobiles, from sunken ships and from burned buildings would ever be sufficient proof of causation either.

To deprive a party in this way of having his case become precedent for future cases could well, if effect, also deny that party the basic right to have existing law decide his case under principles of stare decisis. That principle, that the courts are bound by their prior decisions, is the only reliable limit on judicial power. Without the doctrine of stare decisis always applying, the law can be changed from white to black for one case only without leaving a trace of the injustice behind.

Such a result, arbitrarily depriving a citizen of the protection of the law, offends the constitutional doctrines of Due Process of Law and the Equal Protection of

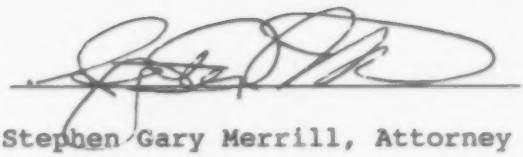
the Laws.

IV. CONCLUSION

There are few restraints the law now imposes on federal judges concerning the manner in which they conduct trials. Liteky v. United States, 510 U.S. _____(1994). If federal judges are given by default the further power to disregard the historical right to trial by jury and then to hide such an injustice from public accountability, both the Seventh Amendment and the Fourteenth Amendment have lost their vitality.

This petition merits granting since the opinion below ``has so far departed from the accepted and usual course of judicial proceedings .... [and] .... so far sanctioned such a departure by a lower court ... to call for an exercise of this Court's power of

supervision.'' United States Supreme Court Rule 17(a).



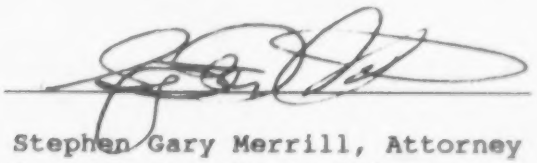
Stephen Gary Merrill, Attorney

Counsel for the Petitioner

V. CERTIFICATE

I certify that I am a member of the bar of this Court and that appropriate copies of this Petition for a Writ Certiorari have been mailed to counsel of record, James C. McCaa, III, Attorney, TAYLOR & WALKER, P.C., Suite 400 City Centre Building, 223 East City Hall Avenue, Post Office Box 3490, Norfolk, Virginia 23514, counsel for Mallory Electric, Inc., Stephen R. Jackson, Attorney, WILLCOX & SAVAGE, P.C., 1800 NationsBank Center, Norfolk, Virginia 23510, counsel for R.B. Hazard, Inc., and Peter C. Manson, Jr.,

Attorney, PENDER & COWARD, P.C., Fourth Floor, Greenwich Centre, 192 Ballard Court, Virginia Beach, Virginia 23462, counsel for Central Fence of CNY, Inc. and Thomas DeSantis, this 2nd day of May, 1994.



Stephen Gary Merrill, Attorney
Counsel for the Petitioner

APPENDIX INDEX

(1) Fourth Circuit Court of Appeal Opinion of 1/10/94..... 1A

(2) Fourth Circuit Court Order of 2/4/94 denying the Appellant's Petition for Rehearing with suggestion for Hearing En Banc..... 24A

(3) Oral Opinion of the United States District Court for the Eastern District of Virginia of June 16, 1992 ..... 26A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Ardeshir Daneshmand,

Plaintiff-Appellant,

v. No. 92-1856

R. B. Hazard, Inc.; Thomas

DeSantis, Jr., a/k/a Fence World;

Central Fence of CNY, Incorporated,

Defendants-Appellees,

v.

Mallory Electric Company,

Third Party Defendant-Appellee.

Appeal for the United States District Court
for the Eastern District of Virginia, at
Norfolk.
Robert G. Doumar, District Judge.
(CA-91-570-N)

Argued: March 1, 1993

Decided: January 10, 1994

Before PHILLIPS and MURNAGHAN, Circuit Judges, and HILL, Senior Circuit Judge of the United States Court of Appeals for the eleventh Circuit, Sitting by designation.

Affirmed by Unpublished opinion. Judge Phillips wrote the opinion, in which Judge Murnaghan and Senior Judge Hill joined.

COUNSEL

ARGUED: Stephen Gary Merrill, Norfolk, Virginia, for Appellant. Stephen Royce Jackson, WILCOX & SAVAGE, P.C., Norfolk, Virginia; Peter Clark Manson, Jr., PENDER & COWARD, Virginia Beach, Virginia, for Appellees. **ON BRIEF:** Philip J. Infantino, PENDER & COWARD, Virginia Beach, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PHILLIPS, Circuit Judge:

Ardeshir Daneshmand appeals from an adverse judgment in his personal injury action against a number of government contractors and subcontractors who participated in the manufacture and installation of a fence gate which fell upon Daneshmand in a military installation. We affirm.

I

In January of 1986, then-Sergeant Ardeshir Daneshmand was detailed to close a gate in a large fence enclosing the Fort Story hovercraft facility in Virginia Beach,

Virginia. While he and another soldier were closing the gate, it collapsed on Daneshmand, causing injuries, primarily to his lower back. As a result, Daneshmand was forced to accept a hardship discharge from Army in which he received a VA disability rating of twenty percent.

A similar though not identical gate in the same fence installation had collapsed twice in October 1985, first on Sergeant Lisa Booker's car and later on Sergeant John Panco's foot. Panco, who was medically discharged from the Army because of his foot injury, won a judgment in a Virginia state court action against the general contractor in charge of the overall fence installation project, R. B. Hazard, Inc. See R. B. Hazard, Inc. v. Panco, 397 S.E. 2d 866 (Va. 1990). In that case, the Virginia court identified as the effective cause of Panco's injuries

the sloping concrete pad over which the gate which injured him was installed and the adjustments made to the gate to compensate for that slope, holding Hazard responsible for these conditions.

Daneshmand brought this diversity action against Hazard, along with Thomas DeSantis, Jr., the gate's installer, and Central Fence of CNY, Inc., the subcontractor who built the fence and contracted with DeSantis to install it, alleging negligence and breach of various warranties. Hazard and Central Fence filed third-party complaint against Mallory Electric Company, Inc., which had installed a ground wire on the gate shortly before its collapse, seeking contribution for negligence and common law indemnity. Daneshmand sought compensatory damages from all three defendants and punitive damages from Hazard and Central Fence.

The district court granted summary judgment in favor of Hazard and Central Fence on the punitive damages claims. A jury trial on the remaining claims ended in a grant of judgment as matter of law for all the defendants on all the claims at the conclusion of Daneshmand's case-in-chief.

This appeal followed. On it, Daneshmand assigns as error the district court's grant of judgment as a matter of law at trial, the court's earlier grant of summary judgment for Hazard and Central Fence on the punitive damages claims, and several of the court's evidentiary rulings.

II

We first address the propriety of the grant of judgment as a matter of law at the conclusion of Daneshmand's case-in-chief.

Though Daneshmand's claims invoked both negligence and breach of warranty theories,

an essential element of each was that a basic design defect known to be uncorrected by each of the Appellee-contractors involved in providing the gate to the Army was a proximate cause of its fall and hence of Daneshmand's injuries.1 And though the

---

1 Daneshmand's theories of recovery were a hodgepodge of negligence and warranty whose imprecise development caused confusion throughout the district court litigation. A pre-trial order rejected any right to recover against any of the named defendants none of whom designed the gate - on any theory of design defect, in response to Daneshmand's contention that, though not pleaded, such a theory could be asserted. J.A. at 105.

As presented at trial and on this appeal, the negligence theory as to Hazard was that it breached a duty of care owed to Daneshmand (and other ``users'') of the gate, by failing to supervise and prevent its installation in a known defective state and thereafter in failing to correct it. Appellant's Br. 25, 26; against Central Fence, the gate's sub-contractor manufacturer, that it breached a duty of care to potential users of the gate by building it according to a design that it knew posed a danger, id. 28; against DeSantis, the sub-contractor installer, that

district court's oral ruling may be thought to have rested on several alternative the central ground was the insufficiency of the evidence to support a jury finding on that critical causation issue.2

---

he failed to warn of or correct the same known danger. Id. 30. While there are significant problems other than causation about the application of these negligence theories to the evidence advanced in their support, causation is of course an essential element of each.

The warranty theory as presented at trial and on this appeal was that ``[e]ach of the contractors breached a warranty of fitness for a particular purpose in building and selling the gate, and that this warranty was ``extended ... by operation of law'' to ``third parties: such as Daneshmand. Appellant's Br. 31. As with the negligence theories, though there may be significant problems other than causation in applying such a warranty theory to these contractors, causation is in any event an essential element whose failure of proof defeats the claim.

2 As to negligence: problems of vicarious liability, J.A. at 1218, 1226, and of the breach of any duty owed, id. at 1229-1236.

As to breach of warranty: problems of privity, id. as 1243; and of third-party beneficiary, id.

J.A. at 1238-39, 1247. Because we agree that that was a sufficient ground, we confine discussion to it.

In this circuit, a stringent standard is applied to determine the sufficiency of evidence to prove physical or motivational causation. We require that the evidence be sufficient to permit a jury rationally to infer the requisite cause as a ``probable,'' not merely a ``possible,'' one. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-42 (4th Cir. 1982) (because of the ``impossibility of choosing rationally between mere `possibilities'''); Wratchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 10066 (4th Cir. 1969) (Haynsworth, J.) (because ``if the inference [of causation] ... lacks substantial probability, any attempted resolution of the question may well

lie within the area of surmise and conjecture''); Ford Motor Co. v. McDavid, 259 F.2d 261, 266 (4th Cir. 1958) (Haynsworth, J. (``[p]ermissible inferences [of causation] must still be within the range of reasonable probability''); Ralston Purina Co. v. Edmunds, 241 F.2d 164, 168 (4th Cir. 1957) (Sobeloff, J.) (only evidence ``which shows a `probability' and not a mere `possibility' [of causation]'' suffices). In applying that standard we of course are bound to give the non-moving party the benefit of every favorable inference, to accept the credibility of all favorable testimony, and to resolve any inconsistencies or conflicts in his favor. Garraghty v. Jordan, 830 F.2d 1295, 1302 (4th Cir. 1987). But in doing so, we may take into account all the evidence bearing upon potentially dispositive issues that is not contradicted or in direct

conflict with that favorable to the non-movant. St. Paul Fire & Marine Ins. Co. v. Vaughn, 779 F.2d 1003, 1008 (4th Cir. 1985).

Here, Daneshmand's factual theory of causation, critical to all of his legal theories, was that, as designed, and as was readily apparent to each of the defendant-contractors, the gate was simply too heavy and its supporting elements too flimsy to be operated with safety by those opening and closing it; that these structural deficiencies were bound in time to cause the gate to fall; and that because uncorrected by each of the defendant-contractors, these deficiencies did in fact cause it to fall and injure Daneshmand.3 But the evidence offered

---

3 The design of the gate was of course critical to the prosecution of all the claims, whether of negligence or warranty. For our purposes, the critical elements of

to prove that uncorrected structural deficiencies were the cause in fact of the gate's fall and the resulting injury

---

the design can be summarized. The ``gate'' in question was actually one of two 40-foot sections of a ``rolling'' metal gate seven feet high that was designed to close an eighty-foot gap in the facility fence. The two 40-foot sections closed and opened by ``rolling,'' in a direct line of the fence (rather than by ``swinging'' open and shut), along a track formed by metal ``rollers'', two upper and two lower, mounted by fence posts,. that partially enclosed the gate's upper and lower horizontal members and kept it on line as it ``rolled'' either to open or closed positions. A critical feature of the design for our purposes was that the gate was thereby held upright - preventing from falling - by its ``fit'' within the two sets of rollers, one upper and one lower, so that any slippage of either upper or lower rollers that destroyed the fit would affect the lateral support of the gate that the ``rollers'' supplied.

A subsidiary feature of the design that figured heavily in testimony but, as it turned out, not at all in a proper assessment of the claim, were ``wheels'' (not the fence-mounted ``rollers) attached to the bottom of the leading edges of the gate sections. These provided additional support to the gate sections as they neared their closed positions, by touching and traveling along the concrete ground surface of the gate opening.

sufficed only to show this as one of several equally arguable possibilities.

In the first place, the evidence of just what acted as the immediate physical cause of the collapse was by no means certain. Direct eye-witness testimony established only that the gate fell while Daneshmand and another soldier were pushing one of its two sections into closed position, but did not establish more detail of the immediate physical cause. The opportunity for physical inspection of the gate after its fall was limited to a period of two weeks, at the end of which someone destroyed it. For this reason, the fallen gate was not available as a physical exhibit at trial and its physical construction and mode of operation had to be put in evidence by the testimony of persons who saw it during installation and operation before the collapse and during the brief

post-fall interval before its destruction, aided to some extent by photographs and copies of plans and specifications. As a result, the evidence of just exactly what acted as the immediate mechanical cause of the collapse was not flatly established.

The best evidence on this point from Daneshmand's standpoint was that the immediate cause was the slipping down of the front one of the two bottom rollers on which the gate rested in travel, thereby causing the gate to drop from the lateral support provided by the upper rollers, hence to fall.4 But the question of what had caused the lower roller to slip - the most critical link in the legal causation chain back to any conduct of the contractor defendants - was

---

4 See note 3, supra.

---

even more speculative, leading in the end only to equally uncertain possibilities. The best evidence on this point from Daneshmand's standpoint was the opinion testimony of an engineering expert, Scott, and of a contractor, Stenke, who had bid unsuccessfully for the job (neither of whom had seen the gate) that the design of the gate - its weight and configuration - was such that the stresses of normal operation would in time so weaken its supporting elements - including the rollers - that just such a collapse as occurred was inevitable. But neither of those witnesses, not any other witness, was able to testify with any assurance that normal operation rather than supervening extraneous forces had caused the crucial slipping down of the offending bottom roller. And two such possibilities, neither directly contradictory of any evidence

favorable to Daneshmand on this critical question, were developed by the evidence.

First there was uncontradicted evidence that during its operation, the gate had actually been subjected to abusive, rather than normal, operation by military personnel. Specifically, there was evidence that military personnel had frequently slammed the gate open and shut with such unneeded force as to weaken or warp the alignment of the critical rollers which supported the gate, and to dislodge its supporting wheels, and that they had on at lease one occasion used a truck to push the gate to the desired position.

Second, there was uncontradicted evidence that following the gate's installation by DeSantis, Mallory Electric Co., the electrical sub-contractor that was not joined as an original defendant, had

improperly installed a copper cable (to ground the force for lightning protection)by running it through the rollers' supporting brackets that were attached to the metal fence post next to the gate opening rather than, as was proper, by using independent support. And there was further evidence, not directly contradicted by any other, that this was the precipitating physical cause of the offending roller's slippage, hence the gate's fall. Specifically, Donald Dow, the Corps of Engineers' area engineer, opined on the basis of his post-accident inspection of the gate that the bracket supporting the offending roller had been loosened in order to attach the cable to it, and in consequence had slipped down. J.A. at 364. Thomas DeSantis, the sub-contractor who installed the fence opined more specifically, on the basis of his post-accident inspection of the gate, that

the bracket and roller had dropped ``a good inch and a half'' and that it did so because the cable's placement and made it impossible to tighten down the u-bolts supporting the bracket and roller sufficiently to prevent the slippage that occurred. J.A. at 465.

On this state of the evidence as to the legal cause of Daneshmand's injury, we conclude, with the district court, that any uncorrected structural deficiency of the gate that could be attributable to the conduct of any of the defendant-contractors exists only as, at best, one of several equally plausible possibilities for its fall and not as probability sufficient to support a rational jury finding. On this basis, applying our standard for assessing the sufficiency of the evidence to prove causation, we agree with the district court's assessment that all the claims fail as a matter of law on this

element.5

III

Daneshmand also assigns as error the district court's exclusion of testimony from the Panco trial, a DeSantis deposition, and the proposed expert testimony be recall of George Stenke. All involved discretionary rulings which we review only for abuse, and we find no abuse as to any of the rulings.

A

In excluding testimony from the Panco trial, the district court relied in part on its judgment that ``there is no showing that this incident with regard to the first gate is the same as the second gate.'' J.A. at 892. Given that the Virginia courts

---

5 This conclusion makes it unnecessary to address Daneshmand's separate challenge to the dismissal of his punitive damages claims against Hazard and Central Fence by summary judgment.

attributed the collapse of the Panco gate to the uneven concrete paid beneath it and ``adjustments made to correct the problem stemming from the angle on which the pad had been poured,'' Panco, 197 S.E.2d and 869, the district court's assessment was well within its discretion.

B

The district court also did not abuse its discretion refusing to admit the DeSantis deposition as substantive evidence. Daneshmand did not list this deposition and did not list DeSantis's as a de bene esse deposition in the witness list submitted for the Final Pretrial Order, though he did list DeSantis as a fact witness. J.A. at 166-169. Daneshmand's only indication that he intended to use this deposition was in a letter to the defendants' attorneys in which his attorney stated that ``I also intend to employ

relevant portions of other depositions ... in impeachment or rebuttal of trial testimony. These include the transcripts of testimony of Mr. DeSantis ....'' J.A.at 858. On the basis of this letter, the district court allowed Daneshmand to use the deposition for impeachment and rebuttal purposes only. This was a proper exercise of discretion.

Furthermore, as Daneshmand failed to make an offer of proof to the district court on the deposition pursuant to Fed. R. Evid. 103(a)(2), he has not properly preserved this point for review.

Finally, we note that on the critical causation issue, the DeSantis deposition actually appears to be detrimental to Daneshmand's case, for in this deposition, DeSantis explained in even greater detail than he testified at trial why he knew ``for fact'' that the installation of the copper

wire had caused the gate to fall. J.A. at 1553-1557.

C

The district court's refusal to allow Daneshmand to recall his witness, George Stenke, as an expert witness during his case-in-chief was based on the fact that Stenke had already substantially offered the opinion testimony Daneshmand now argues he intended to elicit by recalling him.6 Moreover, Stenke's affidavit regarding what he was

---

6 Although Stenke did not testify that the gate's excessive size and weight could cause it to fall, as his affidavit indicates he was prepared to testify, he did state during the trial that he was ``very concerned from a Safety standpoint'' with the gate's design and had insisted that he ``would have to be indemnified if we did it that way.'' J.A. at 228. Viewing this testimony that the gate's excessive size and weight could cause it to fall. Thus, it adds nothing, as indeed Stenke's affidavit adds nothing, to the speculative casual testimony of Scott and Bretz.

prepared to testify reveals that such testimony could not have helped Daneshmand to establish causation, as it was essentially only repetition of his opinion that the gate's excessive size and weight could have caused it to fall.

AFFIRMED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

File February 2, 1994 No. 92-1856

CA-91-570-N

ARDESHIR DANESHMAND

Plaintiff - Appellant

v.

R.B. HAZARD, INC., THOMAS DESANTIS, JR., a/k/a Fence World;

CENTRAL FENCE OF CNY, INCORPORATED

Defendants - Appellees

v.

MALLORY ELECTRIC COMPANY

Third Party Defendant - Appellee

On Petition for Rehearing with Suggestion for Rehearing in Banc

---

Appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

ORAL OPINION OF THE UNITED STATES DISTRICT COURT
AS IT READS IN THE TRIAL TRANSCRIPT

THE COURT: What were you able to do, gentlemen?

MR.MERRILL: There has been no real change in the defendant's position from before trial.

THE COURT: No change?

MR.JACKSON: I think we have been watching different trials.

THE COURT: All right. I understand your position.

Gentlemen, I have motions to strike here, motions for judgment as a matter of law filed by -- who is knocking on the door -- filed by all of the defendants in this case.

In relation to all of these motions, the initial matter to discuss, this is a construction contract. When we analyze this case we have to start at the beginning, or

try to convey some sense of a whole to the case so that we can understand it. This case concerns a construction contract for the United States Army for a hovercraft facility located on a federal reservation at Fort Story, Virginia.

It doesn't take much to look at exhibit 2 to realize that the most famous landmark in Virginia is exhibited there. That is the Cape Henry light. It is right where the ocean meets the bay, or the entrance to the Chesapeake Bay. The aerial photograph shows that.

Hovercraft are large amphibious vehicles which carry troops and equipment for the Army, and this particular facility was designed to house and keep those particular hovercraft.

The contract itself, as one goes through is, is the usual government contract for

construction, not for procurement of material, but for the construction of this hovercraft facility, or site, and the entire construction of it.

We have referred to some of the general clauses. I think it is in -- I forgot the contract. The number, what is that number on that big book there, Beth, the black book in front of you? What number is on the outside? Exhibit number?

THE CLERK: Defendant's exhibit 2.

THE COURT: Defendant's exhibit 2 is the contract.

Defendant's exhibit 4 is the aerial photograph.

In relation to this particular facility, the plaintiff on January 30th, 1986, was injured at Fort Story on the military reservation when a chain link fence-type gate fell on the plaintiff, who was, which gate

was of a rolling or cantilever type.

At the time the plaintiff was a member of the United States Army stationed at Fort Story, Virginia.

The evidence in the case indicates that the gate was constructed by Mr. DeSantis, trading as DeSantis fence, under a subcontract with Central Fence, who in turn was under a subcontract from Hazard. Thus Hazard had subcontracted the fence work to Central Fence of New York, who in turn subcontracted at least this portion of the work, if not more, and I am not sure exactly which, but a portion of the work to Mr. DeSantis trading as Fence World, I believe it was.

Central fence, as well as Thomas DeSantis Jr., are both, the evidence has shown clearly beyond any shadow of a doubt, that they are independent contractors on the

evidence adduced herein.

The particular portion of the construction that is under question in this case was being used by the United States Army, having been inspected under the evidence of these so far, and not necessarily accepted under the terms of the contract.

But his is where we go into some law. But it was put in for use, and at least one of the witnesses for the plaintiff indicated that the Army had accepted the particular gate in question and had inspected the gate.

Both Mordecai, the Army engineer, and Whitehead testified that the gate was accepted and turned over to the Army for use. Both of them. That that particular facility, which was the second facility, was in use by the United States Army. And the soldiers themselves had testified that it was being used for some time.

The liability of negligence, we will start with that in relation to the law, would necessarily depend upon the relationship of the parties and the duties owed and the casual connection of those duties with the accident in question.

The gate was accepted sometime in October or early November 19, 1985.

The incident or accident occurred on or about January 30th, 1986. The plaintiff at the time was a member of the United States Army, subject to an under the control of the United States Army.

The particular contract, exhibit 2, was a construction contract for the entire facility to be built in three stages, and we are in what has been referred to as the second stage.

I believe on exhibit -- now look at exhibit number 4, which is the aerial

photograph, and I can tell better what they are dealing with. Exhibit 4, please. That's not he aerial photograph.

THE CLERK: You mean defendant's exhibit 4?

THE COURT: Defendant's exhibit 4. Excuse me.

This has been, the particular area in question is shown as number 23 on defendant's exhibit 4 in this facility.

At the time of the accident, or incident, the fence and gate -- well, we first better go into what law applies. My gracious.

In relation to government contracts, here Hazard is the general contractor and won the contract. As I stated it, subcontracted it to Central Fence, who in turn subcontracted at least this portion of the contract involved in this case to Thomas

DeSantis, trading as Fence World.

And as I said, there isn't any question that they are independent contractors. Mr. DeSantis testified as such. There is no showing of any connection other than that they are independent contractors.

This would of necessity eliminate R. B. Hazard Incorporated and Central Fence of the negligence claim arising by virtue of the actions of DeSantis. Now only the negligence claims.

Now, in relation to Mr. DeSantis, when we look at the contract it becomes apparent that federal law generally controls in the interpretation and application of the contract. Certainly the United States v. County of Allegheny, which is 322 U.S. 174, page 183, 1944 opinion, says:

``The validity and construction of contracts through which the United States is

exercising its constitutional functions, their consequence on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."

This also seems to be borne out in Article IV, Section 3, Clause 2 of the Constitution relating to rules and regulations concerning territory or other property of the United States exclusively under their control, the Congress shall make rules and regulations of the laws that apply thereto.

Of course, in government contracts we have seen the growth of government defense contracts, but we have also seen the growth of laws concerning various other matters that concern it.

So that the question is whether one is guided by whatever law one should be guided by. The question of the application of the

Uniform Commercial Code seems to be the subject of some problem. In the Court of Claims, the Commercial Code generally is not applied in relation to government contracts. That is Article 2, definition of goods, in the Court of Claims.

In other circuits the Commercial Code is applied in relation to the code.

Whether or not to apply the Commercial Code is a question. The plaintiff has not indicated whether or not to apply it or not to apply it. If he wants to find out what the ruling is before he determines whether to apply it or not apply it. And I am going to ask him now does he want to apply the Uniform Commercial Code of the state of Virginia is what I am interested in. Do you advocate its applying to this case?

MR. MERRILL: I don't pretend to know precisely what the law is. I would say,

yes, the Uniform Commercial Code would apply.

THE COURT: All right.

If the Uniform Commercial Code is applied and I am willing to apply it in the absence of the showing of any federal law applying. If I apply it I am going to apply the entire Uniform Commercial Code of Virginia.

And, therefore, what is your position with regard to it for the defendants, Mr. Jackson?

MR. JACKSON: Our position, Judge, is that it didn't apply in the first place. But if the Court is inclined to apply it, our position is that the claims of implied warranty have not been proven.

THE COURT: I didn't ask you about that. I just -- Mr. Jackson, you have been in this trial too long. The question is very simple: Do you contend any other law than the Uniform

Commercial Code of Virginia applies? If so, what law do you contend applies? Everybody is playing games. At some point some law has got to apply.

MR. JACKSON: Yes, sir. We would contend that it doesn't apply. But --

THE COURT: All right. Than what law does apply?

MR. JACKSON: We contend in that case that the Mann v. Clowser implied warranty of workmanship would be an allocation which it is outside of Article II.

THE COURT: I didn't ask you if Mann v. Clowser applied. I don't have any doubts it applies.

But my questions, do you contend that the Uniform Commercial Code does or does not apply, and if it doesn't apply what do you contend is the federal law that does apply? And the definition of the rights and

obligations in relation to what is goods, or what may not be goods, as to whatever it may be.

MR. JACKSON: We contend that it doesn't apply.

THE COURT: What does apply? Mann v. Clowser is the law that you say applies?

MR. JACKSON: Yes, sir.

THE COURT: All right.

How about you, Mr. Lynch?

MR. LYNCH: Your Honor, it is difficult to answer the Court's question because I don't believe --

THE COURT: You have been in this trial too long too. Do you have any contention?

MR. LYNCH: My contention is that UCC is not applicable because it is not a sale.

THE COURT: I understand your contention.

MR. LYNCH: All right, sir.

THE COURT: Now, what else do you contend? Do you contend that if the UCC did apply, that the rights and obligations would be governed by them?

MR. LYNCH: Easiest if it was applicable. Yes, sir.

THE COURT: Mr. Manson, what is your position?

MR. MANSON: Your Honor, if the UCC applies I contend that it is Virginia's version of UCC as opposed to standard UCC.

THE COURT: All right. Now let me see if I understand your position, Mr. Merrill. So far everybody is waffling. What is your position?

MR. MERRILL: The UCC applies. As it reflects federal contracts, the general UCC applies.

THE COURT: All right. The parties are pressing the application of Virginia law and

I will utilize it.

Now, when we get that I seem to clearly understand where we are going here in relation to the UCC, Article II of the UCC, which is universal throughout the United States. I don't know of any state that made any changes, or at least it was adopted that may define goods, and certainly the Virginia UCC defines goods. Would you get me those two codes, please.

```"`Goods' means all things, (including specially manufactured goods) which are movable at the time of the identification to the contract for sale other than the money in which the price is to be paid, investment securities and things in action. `Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this title whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance."```
```

Now, in relation to a fence, there is a Virginia case directly on point. I think that I have cited it. A court of Appeals case of Virginia which was decided June 2nd of this year. That's Dalton v. Commonwealth. I haven't got the cite. 1992 W.L. 115627, Virginia, decided June 2, 1992.

This concerns whether a chain link fence is part of the realty, and a chain link fence is part of the realty under Virginia law. So if we construe it under Virginia law a chain link fence is part of the realty.

But that doesn't answer the entire question. The question is whether these are goods. It is a construction contract. Certainly the deliverance of material might be considered goods. The fabrication of material is building a building, or building a fence, or building part of the realty. If one doesn't decide whether there are goods or

not, and one assumes that they would be goods, we can discuss it on that level. if they are goods, then the goods were accepted under the Uniform Commercial Code. Acceptance of goods occurs when the buyer does any act inconsistent with the sellers ownership. That's under Uniform Commercial Code 2-606. I think it is 1 C.

And this is has been shown under the John C. Kohler Company v. The United States. 498 F.2d 1360. 1974 Court of Claims decision.

Thus, once somebody does any act inconsistent with seller's ownership they have accepted the goods.

I find that under the evidence in this case there is no other interpretation that could take place other than -- the best that could be said is that the Army accepted the goods, material and construction. Certainly

their use is inconsistent with any non-acceptance of the goods or construction. They are using them. They even abused or misused them by pushing them with a truck. They called the Public Works Department of the Navy, according to some testimony who performed work on them. The Navy facility is down the road a few miles at Little Creek. The OM of the Army didn't work on it as far as we can tell. But the Navy Department of Public Works worked on it according to the testimony that's been admitted. After the fence and gates were accepted by the Army and in use by them. But that's not the important testimony.

The important testimony is the fact that these gates were in use by the Army for hovercraft for the facility. And this particular facility was in use for more than certainly that month, November, the entire

month of December, and the entire month of January. And on the 30th day of January when this accident happened. Certainly fore than two months, perhaps more than three months under the evidence, depending on how one interprets it.

Now, thus we have acceptance of the goods or construction. If they are goods one must then determine what it is that we are dealing with in relation not so much to the negligence situation, but to the warranty situation.

In the negligence we have a problem with the general contractor who relied on the subcontractor. Certainly the general contractor can not be responsible for the acts of the subcontractor. If it is an independent subcontractor. The evidence is clear that those involved in this particular fence and gate are independent contractors.

The Court finds that, indeed clearly shows that Central Fence, DeSantis and Mallory Electric are independent contractors. Thus, any claim of negligence arising by virtue of any negligence by DeSantis is not imputable to Central Fence or Hazard, and any claim of negligence arising by virtue of any negligence by Mallory is not imputable to any defendant. Mallory was not sued as a defendant and therefore cannot be liable to plaintiff in this case for its own negligence.

Now, in warranty we have an entirely different situation. But we have some other matters running. And that is the direct negligence, if any, of the general contracting, which contributed to cause any of the actions in this case.

The testimony at this stage of the trial, at best, indicates that there is no

information which Hazard did not have which anyone could possibly give them in relation to what a reasonably prudent fencing contractor would do under the same or similar circumstances.

In understand in federal contract law one cannot consider it in the vacuum. We cannot say that Court relying on contracts aren't governed by how the contract is governed.

Any lawyer who deals in procurement will tell you that no subcontractor can make a claim against the United States. The subcontractor Cannot make a claim against the United States but he claim, if any, must be made by the general contractor with the United States. That is, if the subcontractor has to do any extra work, perform any extra services, do any extra thing of any kind or nature or description, he can only claim

against the person with whom he contracts directly. Who in turn, if it is a general contractor, the general can make a claim against the United States, but not the sub.

One must look at the case with regard to the law that applies in the contract aspects where one is dealing with the rights and duties and obligations arising out of the contract.

He cannot get-- a subcontractor cannot even get a lien against the United States. He cannot recover for any work against the United States. He can only -- his sole remedy is against the person with whom he contracts. The general contractor must make any claim. If one does not consider the law in relation to the relationship between the parties one becomes disastrous. Because one can't require a person to do that which the person has no remedy for. But it indicates

what are the duties of the person who is involved.

The Virginia cases, and certainly the case of Radosevic v. Virginia Intermont College is one. It is in 651 F.Supp 1037. Western District of Virginia case (1987). Judge Glen Williams wrote a very comprehensive opinion in relation to certain duties, especially in relation to warranties. I commend the case to you.

It indicates that under Virginia law a person may be a third-party beneficiary of a contract but not in this case. In this case the soldiers are not the third-party beneficiary of any contracts between the parties. The contracts were not intended to be for the benefit of the soldier himself. It was to benefit the United States and provide a facility for hovercraft. It was not intended for the benefit of the soldier.

If one goes back and looks at the case of Mann v. Clowser, 595 S.E. 2d. 78, and its progeny, which is the case here, and one can see the development of the law of building contracts. It indicates that a reasonably prudent fence contractor, or builder, in this case the test of Mr. DeSantis, whether it be in implied warranty, or whether it be in negligence, is exactly the same. The primary difference is that in implied warranty contributory negligence is not a bar. And in the other case, misuse or abuse of the product is a bar. If it is a product or good, privity is unimportant. If not, it is essential.

Under Virginia law a general building contractor has a duty to advise the owner of those things that it knows, or reasonably should have known would be defective in a particular plan if the plan is given to them.

and such defectiveness is unknown to the owner. V.M.I. v. King, 232 S.E.3d 895.

Under the contract law here, and the way that federal contracts would work, Mr. DeSantis would have the burden of bringing to the attention of those with whom he contracted, whether it be the subcontractor or the general contractor, in this case Hazard, the problem. There follow several questions.

1. Did the contractor have a duty to the general public to advise the owner of certain design defects or problems.

2. Did the owner obtain knowledge of the problem.

3. Did that problem or defect cause the gate to fall on the plaintiff.

Now, what are the problems? And that is an interesting point. In this case there was an inspection after the accident conducted by

Mr. Mordecai, the Army engineer, certainly at least one witness who testified, and he is the project engineer for the Army engineers. That does not mean to say he is the design engineer. And I am not indicating that. Mordecai did graduate from The University of Virginia School of Engineering.

Now, Mordecai said that in his opinion one of the wheels, which are referred to as rollers, had dropped down. This is a gate which is suspended on the rollers with added wheels bearing weight on the bottom of the gate. The rollers are on the fence. There are separate wheels on the gate. It may be a cantilever gate. It is titled a roller gate on the plans. This is the opinion of Mordecai who was on the scene and whose duty it was to represent the Army engineers during the construction and to determine the problem.

What did Hazard know? I find that under the evidence, and construing the evidence most strongly in favor of the plaintiff, under the evidence, Hazard was aware of what Mr. Stenke told them. He was aware of what Mr. DeSantis told him. He was aware of -- I say he -- Hazard was aware of those things that resulted in various discussions that Morda\ecai, Whitehead, Dow, indicated. The evidence indicates that Mordecai as well as these government people knew what Hazard knew before the fence and gate were built. Thus the government was aware of the before the fence and gate were built. Thus the government was aware of the problem.

If we go to Stenke, Stenke, as a fence contractor, told Hazard everything that could possibly be told to him by a fence contractor. There is nothing more that could be told to him. So Hazard's knowledge

couldn't be enhance by DeSantis. There is no way to enhance it.

They knew it all.

Thus DeSantis' duty under Mann v. Clowser or any duty to inform the person is to inform them about a risk that they wouldn't have known whether DeSantis or a reasonable fence contractor should have known it or not. It is of no consequence when the person with whom he is contracting knows the risk or has already learned of it.

There isn't any question that it was brought to the attention of Hazard and the Army's engineer, Mordecai.

A lot is said about saving money in this case.

Persons generally don't do something for nothing. They want to get paid for it.

Any reasonable contractor wants to get paid for it. Stenke indicated that he didn't

want to build this. He wanted to build something different.

Brest, who is the person who defined what it was that a reasonably prudent fencing contractor would do, said that in his opinion there were several difficulties or defects.

1. The gate had to be strengthened.

2. The wheels, it was required that they be bigger. 10-inch wheels. That is the support wheels that made this a rolling gate, or a modified cantilever gate, or a modified rolling cantilever gate, or a rolling gate, the wheels on the bottom of the gate. Not the rollers. Whatever one calls it. The wheels had to be strengthened. The gate had to strengthened.

3. A stop -- this is his testimony -- a stop should have been there. This is what a fencing contractor should have known.

No showing that there wasn't any stop.

But whether there was or wasn't a stop is of no consequence. Because the facts show that the gate couldn't have gotten to the stop when it fell in this particular instance. Thus the presence or absence of a stop is in no way involved in this incident. That is the uncontradicted evidence, because the other gate was fully opened and would have operated to stop the gate. In order to avoid a stop it had to be extended past the other closed gate by at least 11 feet. 11 feet beyond that to a, to exceed the stop, to come all the way out. The facts clearly indicate that the gate fell before it was fully opened.

Now, so the question is, the strengthening of the gate and the wheels. The gate was strengthened. That leaves the wheels. Did Hazard know this? Oh, yes. Stenke told them. DeSantis told them.

Everyone told Hazard.

Did the Army engineers know this? Mordecai was aware of the recommendation for a larger wheel. It appears under the evidence, one, that this plan, according to the engineering professor, Mr. Scott, that this gate wouldn't work. It was destined to fail. This is not a defective design case. it is a case of what a reasonable fencing contractor would tell the purchaser.

That's what a certified professional engineer may have believed. No one contends that DeSantis is that, or that any duty lies on a contractor to exercise the same degree of care or skill of a registered professional engineer, or a professional engineer who isn't even registered. Only the duty to know what a reasonable fencing contractor would know.

Oddly enough, Mr. Scott isn't registered

either. So I would assume that he and Mordecai are on the same level insofar as engineering is concerned, except Mr. Scott has more education.

When we go to Brest, we go back to his testimony, because he established the standard. We find out that his solution was to increase the size of the wheel and to strengthen the gate. It was strengthened. And the wheel was attempted to be increased. All of this -- not the wheel wasn't. The wheel wasn't increased. I don't want to indicate that it was. The Army chose not to.

Now, Mordecai, the Army engineer, was told of this problem, and Mordecai's testimony is do it like it is. He wanted someone to build it as shown, he said. He first went to look for a bigger, stronger wheel. Not a roller, but a wheel at the bottom of the gate. He said he couldn't find

one, a heavier wheel. He went over to some supplier. Mordecai knew then, and Mordecai was a representative of the Army Engineers. What more information had to be conveyed to Mordecai? He was the owner. He represented the official U.S. Army Engineer on the job. Must the question then become, what does he not know that he should know insofar as any reasonable fencing contractor or general contractor should tell him?

I admit that Mordecai's actions may or may not be reprehensible in not going back to the district office. But he was the representative of the Army Engineers. Here is a plan drawn by a certified engineer even though another engineer, Scott, says won't work. Here is a plan that is certified by an engineer. It is approved by the Army Engineers. The problems pointed out to Mordecai. What more should be done? Now,

the drawings, or the shop drawings that were drawn up and submitted to the Army were approved by the Army Engineers. They had as built shop drawings. These were done months before this work was performed. Months before. My recollection is that the testimony, or the documents themselves, show that the shop drawings were approved in April 1985. Submitted March 1985. And thus the Army Engineers, in essence, the owner, had approved the shop drawings. Well before it was built, Stenke was trying to get the contract. The shop drawings had to be drawn after DeSantis, who had gotten the contract even, and when Stenke was out of the picture, but he had already told Hazard what the problems were. Mordecai was aware of this.

It was DeSantis who was concerned about the wheels, I believe. And DeSantis certainly brought it to Hazard's attention

and the Army was aware through Mordecai.

It appears that the plans are defective. The testimony from both Scott and Stenke are that this fence, or gate, as planned, is defective. But the defective plan is not the contractor's fault but the design engineer's fault. The design engineer was not sued.

Brest defined what should have been done by a reasonably prudent fencing contractor. The plaintiff has not shown by the evidence that a reasonably prudent fencing contractor would have done anything other than what Mr. DeSantis did. Bring it to the attention of Hazard. Find out about whether the Army would approve something bigger, or get something bigger. The Army made some investigation. Not just some old fellow. But an engineer with the Army Engineers mad some effort -- the project engineer. Mordecai. What further information could

have been communicated to the owner. The plaintiff has shown none.

Mr. Merrill, if you don't mind, sir, I won't have you banging the table, if you don't mind.

MR. MERRILL: Yes, sir.

THE COURT: What further information would a fencing contractor have had to do. As Brest said, he would recommend that the front wheel be increased to a stronger wheel, that there be more vertical supports and that a stop be utilized. That was his recommendation as a reasonable prudent fence contractor.

The vertical supports were added by DeSantis, and the question of the front wheel was definitely brought to the attention of Mr. Mordecai. And the Army chose not to do it. Not to make the changes.

The question comes then to what the

factual, including the VMI case, 232 S.E. 2d. 895. Determinations may be. Mann v. Clowser and its progeny is the law in Virginia. If there was an implied warranty, the question is not that the plan is or is not defective. But the knowledge that the contractor has which should be brought to the attention of the owner, or in essence here the United States Army Engineers. Or the United States Army. This was brought to the attention of the United States Army.

Moreover, there is one positive testimony from Mordecai, from Mordecai and from DeSantis, two of them, that the cause of the gate's failure at this particular time was the lowering of the front roller wheel, which was located on the fence. Lowering of the front roller wheel. Now I am talking about the front wheel being the front roller on the fence through which the gate would

slide. There is some conflicting evidence on this point, however, and that is that the engineer for the plaintiff testified that that couldn't cause the gate to fall unless something were done to one of the other wheels. If not this cause then there was no cause shown for it to fail. But it was inspected after the incident. At the time of the inspection not one person has indicated that any bearings were bad. That any of the wheels on the gate were bad. That anything was bad except that the roller wheel where the wire was installed was lower, causing the gate to come off its track.

We know from the engineer's testimony that the strength of that particular U-bolt would have been stronger if properly attached. It slipped. Did it have any more pressure than any other wheel that didn't slip? The evidence indicates, no.

Thus if you follow the logic's, something caused that particular U-bolt to slip down, or be placed in a different position.

The plaintiff just can't come in and say the design is bad. And, therefore, eventually it will go to pieces. He must show some connection between the eventuality and the incident.

The rollers are part of the fence while the wheels are on the bottom of the gate. There has been no showing that the bearings in the rollers were bad. There has been no showing of any wheel failure of the wheel which touched the ground. There was a showing that the government inspection at the time of the accident indicated that this roller which was closest to the exposed, or gate opening portion, was down, or lowered, several inches, and in their opinion,

DeSantis and Mordecai's, that was the cause of the gate falling.

That the plaintiff chose not to bring this suit against the person, the electrician, whom we know worked on that U-bolt sometime later, sometime in January. His claim against the electrician is of no consequence to this particular suit. However, we now remove the case from the design stage and take the case into a different stage. As off as it may seem, there is no liability by the contractors for the design. The Government was made aware of any defects of its design which could possibly relate to this case.

What we do is take it into the stage of inferior workmanship. So the question then remains is Hazard, does it impliedly warrant that the workmanship of the defendant -- not the -- the third-party defendant.

MR. McCAA: Mallory Electric, Your Honor.

THE COURT: Mallory Electric Company is of good and merchantable quality. And that's where we are.

This implied warranty, and the only implied warranty left in this case, or express warranty is, if it flows to, if no privity is required, and if this is a good, and if it could be severed from the realty. It is a construction contract. And that is the question of whether it is a good or not. The roller where the wire is installed is part of the fence upon which the gate slides or rolls. So we get down to Hazard, implied warranty, and Mallory Electric Company's third-party action. Or Hazard's express or implied warranty of workmanship. Whether it is express or implied, it is a good and workmanlike manner, which means they have to perform it in a good and workmanlike manner.

No one has indicated that DeSantis or Central Fence had any responsibility for the instillation of the wire at this stage of the trial or that it was negligently installed. Or the fact that it fell.

If we adopt the view that has been testified to whether this case can proceed against Hazard involves the question of whether or not Hazard violated their warranty to perform good and workmanlike product and whether there is privity. Under Mann v. Clowser the Court finds that it would flow to the owner. I don't feel that the plaintiff is an intended beneficiary of the owner.

I do feel that if one were to take the question of the gate itself, the gate is easily severable. And although it is part of the realty when attached, I still feel that there may be an implied warranty for the gate. But not for the fence which is part of

the realty. Dalton v. Virginia, 1992 W.L. 115627.

Now the negligence, if any, of Mallory, which is an independent contractor, can't be imputed to Hazard. He wasn't selling goods. He was grounding a wire to the fence. However, the implied warranty is still a good and workmanlike manner. If what Mallory did was goods, than there is no question that the Uniform Code, Commercial Code, would allow the warranty to pass to one not in privity, but only with regard to goods. The Plaintiff cannot recover on a negligence theory where the work is provided by an independent contractor. The oddity about Virginia law is they could not have shown, from Hazard or Mallory, a duty over to the plaintiff in warranty of workmanship because there is no privity of contract in installing a ground wire. Farish v. Farish, opinion of Judge

Sprouse, 754 F.2d.

If the Uniform Commercial Code applies to the performance of Mallory, then Mallory's actions, and Hazard's actions, would impliedly warrant to the plaintiff, by virtue of 8.2-318 of the Code, that's the Code of Virginia. If the Uniform Commercial Code doesn't apply, then negligence would apply. By statute there is no privity required of negligence itself, but negligence of an independent contractor cannot be imputed to the person engaging such contractor.

The Virginia statute covers things not covered by the Virginia Code, or negligence. And that's, that's not 8.2-318, but 8.01 -- not 8.01. Let me look at the statute number.

MR. MANSON: 223, Your Honor.

THE COURT: 8.01-223. That's it. Under 8.01-223 it provides as follows:

``In cases not provided for in 8.2-318 where recovery of damages for injury to

person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense.''

The problem is that that doesn't apply in implied warranty, only in negligence cases. Privity is still required in implied warranty of services and things other than goods. Implied warranty, is basically a contractual claim, and not a negligence claim. The test may be the same for negligence and implied warranty insofar as the violation is concerned. But the law is quite clear in Virginia that these are two distinct remedies and the legislature of Virginia certainly knew it. This is unquestionably the situation in the case. See Farish for Farish, 754 F.2d.

That there is no implied warranty, if no privity between the plaintiff and Hazard. Certainly, there is no privity between the

plaintiff and Hazard. Certainly, there is no privity between the plaintiff and the subcontractors who attached the wire. It is not, attaching the wire to the pole is not in any sense goods. It doesn't fit under the Uniform Commercial Code. So it has to fit under the rest. Thus the only lack of privity statute that would pertain to this 8.01-223, would not apply to warranty claims. As the plaintiff is not a third-party beneficiary of the contract that Hazard had with the United States, and there is no way of the plaintiff to invoke that doctrine since under not a third-party beneficiary of the contract that Hazard had with the United States, and there is no way of the plaintiff to invoke that doctrine since under Radosevic v. Intermont College, which Judge Williams did. January 6, 1986, 651 F. Supp. 1037, (1987) case. Western District of Virginia.

That he is not a third-party beneficiary of this particular conduct. That the claim insofar as Hazard is concerned, with regard to the defective installation of, the alleged defective installation of the wire, must necessarily fail because of lack of privity. But that's the only reason. Privity. Otherwise, it wouldn't fail.

Now when we get therefore to the implied warranty of goods, it is interesting that the gate may be construed to be a good, and I would construe the gate to be a good. The gate itself that fell on the plaintiff. I won't consider the fence post embedded in concrete to which the roller was a part to be a good, and I won't consider what was performed by Mallory to be a good. I will consider the gate to be a good.

Why this particular wire was installed at the point there, I don't know. Other than

the fact that the fence had to be grounded. Why it was put in a particular location there is beyond me. It had to be on any pole. Thus, query, are Central Fence or DeSantis -- is DeSantis responsible for any implied warranty of the subcontractor's work? I don't see it. Moreover, there is no evidence that the wire was negligently installed, merely a supposition.

Excuse me. The counterclaim is by Hazard against --

MR. McCAA: Third-party complaint is against you.

THE COURT: It is from Hazard; is that correct?

MR. McCAA: Both Hazard and Central Fence.

THE COURT: The basis of Central Fence is the negligence?

MR. McCAA: Well, they are asking for

contribution or indemnity. Both Hazard and Central Fence. That's the nature of their claim.

THE COURT: All right. The Court finds that -- I just wanted to make sure.

MR. MERRILL: We had a contract with Hazard. The subcontract with Hazard to ground the fence.

THE COURT: Hazard thus had an independent contractor and is not liable for the negligence, if any, of Mallory. Hazard impliedly warranted to the owner that it would perform in a good and workmanlike manner, and expressly warranted to the owner that it would perform in a good and workmanlike manner. But there is no privity between Hazard and the plaintiff.

The lack of privity under Virginia law would deny the plaintiff recovery under the building contract. There has been no showing

to this Court of any other law that applied other than Virginia law. The Court does find that neither Mallory nor the engineer were directly sued by the plaintiff, and that the subcontractor cannot be judged by the standards of an engineer. An engineer, of course, who has knowledge of the field might testify as to what a reasonably prudent fencing contractor would do if he has the appropriate knowledge.

Thus, this Court finds that judgment should be entered as a matter of law for Mr. DeSantis, trading as Fence World, for Central Fence, and for R.B. Hazard against the defendants.

The Court has dictated this opinion and reserves the right to amend, enlarge upon, modify, not the results of the opinion, but the wording that it may use. It may create and put into the opinion additional -- not

create, but put in additional citations, and may at its leisure write or draft opinions modifying in any way the oral recitation or the reasons for the opinion here in this case.

I reserve that right rather than to try to write an opinion at this time.

In relation to Virginia law I want to add that generally if Virginia law applies to a government contract, Section 8.01-39 provides that acceptance of work is not a bar to action against an independent contractor for personal injury, or wrongful death, or damage to property. The plaintiff didn't cite it, but it ought to be in the opinion.

Thus, in deciding the whole case, what we have are some defective plans. Oddly enough, admittedly defective at least by some witnesses. Which defects were brought to the attention of both Hazard and the general

contractor, and the United States.

Where the United States enters into a contract with plans and specifications and the person builds it in accordance with that, as long as the person communicates to the United States those things which it feels are deficient, that it knows about, that the United States doesn't know about, than it may not be liable. Not one person has testified that the United States didn't know that the plans and specifications were deficient at the time that this particular facility was taken over by the United States in November 1985, a total failure of proof.

There is no testimony other than what a reasonably prudent fence contractor would do, and I don't think his implied warranty exceeds what he would do.

As I have said, the cause of the accident has at this stage, at this stage,

taking the evidence most favorable to the plaintiff in relation to any actions of any of the defendants, is that Mallory erred in installing the wire. And that that particular roller was down. And that the fence fell.

And there was no testimony that any of the bearings or anything else were in any way worn out or had anything to do with this incident. Although the fence may have been defective it is not a question of the defect, it is the question of showing of some proof or casual connection. There has been no showing.

I dealt mostly with the law and assumed that perhaps there was a casual connection. But in contracts, I especially find there is no evidence of any casual connection between any of the actions of the defendant in this case, other than the wire and the lowering of

this particular wheel on the front side of the fence and the particular accident in question, and that is merely an inference.

Therefore, judgment shall be entered in favor of all defendants against the plaintiff.

The action over therefore fails by virtue of the failure of the initial action, the action over being the actions of both of Hazard on its subcontract and Fence World on its concurring negligence theory.

MR. LYNCH: Central.

THE COURT: Central on its concurring negligence theory.

Supreme Court, U.S.
FILED
MAY 13 1994
OFFICE OF THE CLERK

No. 93-1754

In The

Supreme Court of the United States

October Term, 1993

ARDESHIR DANESHMAND,

Petitioner,

v.

R. B. HAZARD, INC.,
CENTRAL FENCE OF CNY, INC., and
THOMAS DeSANTIS, JR. t/a FENCE WORLD,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT BRIEF IN OPPOSITION

STEPHEN R. JACKSON
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510
(804) 628-5500

PETER C. MANSON, JR.
TAYLOR & WALKER, P.C.
Post Office Box 3490
Norfolk, VA 23510-3490
(804) 625-7300

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTION PRESENTED FOR REVIEW

Whether the directed verdict granted in favor of the Respondents by the district court and affirmed by the Fourth Circuit violated the Seventh Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

CITATION OF AUTHORITY iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

1. Constitutionality of Directed Verdict 8

2. Constitutionality of Local Rules 10

CONCLUSION 10

CITATIONS OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 10

Bannister v. Town of Noble, 812 F.2d 1265 (10th Cir. 1987) 9

Brown & Williamson Tobacco Corp. v. Jacobson, 644 F.Supp. 1240 (N.D. Ill. 1986), *aff'd in part, rev'd in part*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 933 (1988) 9

Bryan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 565 F.2d 276 (4th Cir. 1977), *cert. denied*, 435 U.S. 943 (1978) 9

Farner v. Paccar, Inc., 562 F.2d 518 (8th Cir. 1977) 9

Galloway v. United States, 319 U.S. 372 (1943) 9

Gunning v. Cooley, 281 U.S. 90 (1930) 9

Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (11th Cir. 1980) 9

Owens by Owens v. Bourns, Inc., 766 F.2d 145 (4th Cir.), *cert. denied*, 474 U.S. 1038 (1985) 9

Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981) 9

Southern States Coop. v. Doggett, 223 Va. 650, 292 S.E.2d 331 (1982) 9

Two Rivers Co. v. Curtiss Breeding Serv., 624 F.2d 1242 (5th Cir. 1980), *cert. denied*, 450 U.S. 902 (1981) 9

United States v. Williams, 112 S.Ct. 1735 (1992) 10

CITATIONS OF AUTHORITIES – Continued

Page

White Consolidated Indus., Inc. v. Swiney, 237 Va. 23, 376 S.E.2d 283 (1989) 9

Wratchford v. S.J. Grove & Sons Co., 405 F.2d 1061 (4th Cir. 1969) 9

RULES

Sup. Ct. Rule 14.1(a) 5

No. 93-1754

In The

Supreme Court of the United States

October Term, 1993

ARDESHIR DANESHMAND,

Petitioner,

v.

R. B. HAZARD, INC.,
CENTRAL FENCE OF CNY, INC., and
THOMAS DeSANTIS, JR. t/a FENCE WORLD,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT BRIEF IN OPPOSITION

Respondents, R. B. Hazard, Inc. ("Hazard"), Central Fence of CNY, Inc. ("Central Fence"), and Thomas DeSantis, Jr., trading as Fence World ("DeSantis"), hereinafter referred to collectively as "Respondents," respectfully submit the following Joint Brief in Opposition in order to address certain misstatements of fact that appear in the Petition for Writ of Certiorari and respond to Petitioner's Questions Presented.

STATEMENT OF THE CASE

Petitioner's recitation of the pertinent underlying facts is replete with evidence excluded by the trial court. Such excluded evidence includes that pertaining to an earlier accident that involved a different gate and that occurred under dissimilar circumstances, and also evidence concerning the subject gate's design for which none of the Respondents was responsible. In an effort to clarify the record, Respondents submit the following "Statement of the Case". All references are to the Joint Appendix ("JA") filed with the Court of Appeals.

By contract dated January 9, 1984 (JA 1255), construction of three (3) Land Air Cushion Vehicles ("LACV") (JA 621) storage and maintenance facilities for the United States Army Transportation Corps located at Ft. Story in Virginia Beach, Virginia, was awarded to Hazard. (JA 325). The LACVs are more commonly known as hovercraft. The construction was divided into three separate phases, one for each of the facilities to be built. In addition to the site preparation and paving, the construction included erection of large prefabricated metal hangers where the LACVs would be stored and smaller prefabricated metal buildings where spare parts would be stored and maintenance work would be performed by LACV personnel. (JA 621-622). The plans also called for each of the facilities to be enclosed within perimeter fencing and for the installation of large rolling gates through which the LACVs could enter and exit the secured facilities.

In building the several facilities, including the rolling cantilevered gates, Hazard and its subcontractors were

governed by the plans and specifications submitted to them by the Corps of Engineers. (JA 358; 576). The gates had actually been designed for the Corps by Hayes, Seay, Mattern & Mattern, an architectural and engineering firm with offices in Virginia Beach, Virginia. (JA 1249).[1]

Hazard, as general contractor, bid out the fencing and gate work. The successful bidder was Central Fence located in Syracuse, New York. Central Fence subcontracted with DeSantis to do the actual fence and gate installation at the LACV sites. (JA 394-395; 470-471). DeSantis performed his work pursuant to separate contracts for each phase of the construction. (JA 473).

The first job involved a temporary maintenance facility intended to be used by the Army until the other two facilities had been completed. Its surface was asphalt whereas the surfaces of the permanent facilities were concrete.

DeSantis and his crew began to work on the temporary maintenance facility in July, 1985 and completed their work the following month. While erection of the perimeter fencing was accomplished without any difficulty, DeSantis encountered a number of problems with the rolling gates.

The gates, each 51 feet in length covering an opening approximately 80 feet wide, were hung between two sets of rollers attached to gate posts. Accordingly, when closed, 40 feet of each gate had to be extended to the mid-

---

[1] Neither the Corps of Engineers nor Hayes, Seay, Mattern & Mattern were named as defendants and the design of the gates was not at issue.

point of the open area leaving 11 feet of the gate remaining between the rollers affixed to the gate posts. Due to the distance each gate was required to cover on closing and also the size of the gates, the Corps' plans called for wheels to be placed at both ends of the gates to assist in carrying the additional weight. (JA 660-663; 1452). The plans also called for a runway extending along the fence on which the gates' rear wheels could roll.

The initial and primary problem encountered by DeSantis in hanging the temporary facility's gates was caused by a conflict between the gate plan and the site plan. Whereas the gate plan called for the gates to roll on a level surface, the site plan called for a drainage swale with its deepest point located approximately in the center of the gate opening. Because of the resulting decline, DeSantis found that the gates would roll closed on their own. (JA 1429-1430; 1446; 1450; 1502). Additionally, due to their size and weight it was very difficult, if indeed possible, for one man to push the gates open up the incline and, thus, satisfy the specification requirement that the gates be capable of being opened and closed by one person.

DeSantis brought this problem to the attention of Hazard and requested that the temporary maintenance pad's asphalt surface be redone in order to provide a level surface on which the gates could roll. It was ultimately decided, however, simply to level the gates by adjusting the height of the rollers between which the gates travelled. Although that adjustment accomplished its purpose by allowing the gates to be opened and closed by a single person, it also made the wheels on the "open" ends of the gates superfluous since they never touched

the ground and therefore carried none of the gates' weight. (JA 1431-1435; 1505-1508). Additionally, because of their length and the fact that once levelled the gates were supported only by rollers attached to the two gate posts, on closing and opening the top and bottom rails of the gates would bow or sag thereby allowing, according to DeSantis, the top rail to become disengaged from the rollers' flanges. (JA 1436-1438; 1440-1443).

Other problems encountered by DeSantis with the temporary facility's gates included uneven runways, the fact that the runways did not extend far enough back along the fence so that upon being fully opened the gates' rear wheels would drop off onto the sandy terrain on which these facilities were being constructed, the failure of the Army to properly maintain the gates once it accepted and took over beneficial occupancy of the temporary facility in August, 1985, and also the fact that on opening, the rear wheels did not have sufficient clearance and would break upon striking the fence posts.

It was one of the gates installed at the temporary facility that injured Sgt. John Panco on October 17, 1985 and that was the basis of the earlier litigation in the Circuit Court of the City of Virginia Beach, Virginia.[2] The evidence in that case further disclosed that an hour or so

---

[2] The district court excluded any evidence from the *Panco* trial finding that the Petitioner had failed to demonstrate substantial similarity and that any relevance was outweighed by the likelihood that the evidence would confuse the jury. This ruling was affirmed by the Fourth Circuit. Because the issue has not been included among the "Questions Presented" in the petition, it is not subject to the Court's consideration. Sup. Ct. R. 14.1(a).

prior to the Panco accident the gate had fallen on another soldier's car. Although the gate was put back up before injuring Panco, it was not shown how the gate was reinstalled. In that action, Sergeant Panco sued only Hazard and DeSantis. While Hazard subsequently impleaded Central Fence, that third party action was severed prior to trial and Central Fence accordingly did not participate.

The gate that is the subject of the present action was installed in one of the later projects. It differed from the "Panco" gate in a number of particulars. In the first place, the "Daneshmand" gate was fabricated on site by DeSantis whereas Central Fence had fabricated the "Panco" gate in New York. (JA 474). Because of the problem he had earlier encountered with the "Panco" gates bowing, DeSantis added two vertical struts to the "Daneshmand" gates to increase their rigidity. (JA 418-419; 460-461). Additionally, the "Daneshmand" gates were installed on a level concrete surface and the gate's weight was thus supported by its wheels when extended.

Yet another difference between the two gates was the fact that after DeSantis had hung and adjusted the "Daneshmand" gate, the electrical subcontractor, Mallory Electric, improperly used one of the gate's roller brackets to ground an electric cable. (JA 368-370; 646-648). After Daneshmand's accident, that roller bracket was found out of position. (JA 363-364; 673; 684). DeSantis, identified as an expert witness by both Hazard and Central Fence, opined at trial that grounding the wire in that manner allowed the gate to fall. (JA 462-466; 488).

Both at trial (JA 413; 419; 455; 491-493) and during his February 1, 1989 discovery deposition, that was

noticed in both the *Panco* and *Daneshmand* cases (JA 1395), DeSantis pointed out that his critical comments were directed only towards the gates installed on the "Panco" project, the temporary maintenance facility, and that he was quite satisfied with the "Daneshmand" gates that he had fabricated himself (JA 1409-1410; 1451; 1512-1513; 1529-1530; 1532; 1541-1542).

On the basis of the differences between the two gates, as well as the differences between the circumstances under which each fell, Respondents moved the trial court to preclude the Petitioner from introducing, or otherwise relying upon, evidence of the earlier accident involving Sergeant Panco (JA 15-23). During trial, the Respondents consistently objected to Petitioner's repeated attempts not only to impeach DeSantis on the basis of his deposition testimony critical of the "Panco" gate, but also DeSantis' testimony along with that of other witnesses from the Panco trial on the ground that the "substantial similarity" test had not been, and could not be, satisfied. (JA 397-400; 864-865). Those objections were sustained and affirmed on appeal.

The trial court also refused Petitioner's repeated efforts to attach fault to the several Respondents on the basis of the gates' admittedly deficient design. As noted above, the gates had been designed by a third party at the behest of the Corps of Engineers and that third party had not been named as a defendant in the action.

REASONS FOR DENYING THE WRIT

The Petition in this case represents nothing more than the unwillingness of the Petitioner to accept the

well-reasoned and narrowly tailored opinions of both the district court and the Fourth Circuit.[3] Their decisions were based upon a detailed factual record, which demonstrated that the Petitioner failed to adduce sufficient evidence to withstand a motion for directed verdict. The Petitioner is equally unpersuasive in advancing sufficient grounds for review by this Court.

1. Constitutionality of Directed Verdict

The constitutionality of the directed verdict is well-settled. As this Court observed in *Galloway v. United States*:

> If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently, the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure.

319 U.S. 372, 389 (1943) (footnote omitted). Similarly well-settled is the appropriateness of applying federal law on the sufficiency of evidence necessary to create a jury issue. The majority of circuit courts, including the Fourth Circuit, apply federal law to determine sufficiency of the

---

[3] Because of the limited nature of the opinions, neither the district court nor the Fourth Circuit published their opinions. The district court opinion was issued from the bench and the Fourth Circuit opinion was "unpublished."

evidence.[4] The Court has declined to review the issue in the past and it does not merit review in this case.[5] Moreover, the very standard that the Petitioner seeks to apply, the "scintilla of evidence," has been explicitly rejected by this Court as inadequate. *Gunning v. Cooley*, 281 U.S. 90, 94 (1930).

---

[4] The Courts of Appeal that apply federal law to determine sufficiency of the evidence include:

Fourth Circuit: *Owens by Owens v. Bourns, Inc.*, 766 F.2d 145, 149 (4th Cir.), *cert. denied*, 474 U.S. 1038 (1985); *Bryan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 565 F.2d 276, 281 (4th Cir. 1977), *cert. denied*, 435 U.S. 943 (1978); *Wratchford v. S.J. Grove & Sons Co.*, 405 F.2d 1061, 1064-65 (4th Cir. 1969).

Fifth Circuit: *Porter v. American Optical Corp.*, 641 F.2d 1128, 1137 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1249 (5th Cir. 1980), *cert. denied*, 450 U.S. 902 (1981).

Seventh Circuit: *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F.Supp. 1240, 1257 (N.D. Ill. 1986), *aff'd in part, rev'd in part*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 933 (1988).

Eighth Circuit: *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977).

Tenth Circuit: *Bannister v. Town of Noble*, 812 F.2d 1265, 1268 (10th Cir. 1987).

Eleventh Circuit: *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 738 (11th Cir. 1980)

[5] Ironically, Virginia also insists that the evidence be sufficient to permit the jury to find the requisite element of causation as "probable" and not a "mere possibility." *White Consolidated Indus., Inc. v. Swiney*, 237 Va. 23, 28, 376 S.E.2d 283, 285 (1989) (quoting *Southern States Coop. v. Doggett*, 223 Va. 650, 657, 292 S.E.2d 331, 335 (1982)).

2. Constitutionality of Local Rules

The Petitioner next argues that the fact that the Fourth Circuit opinion was "unpublished" somehow deprives him of due process and equal protection. The reasoning advanced by the Petitioner is unclear; however, his failure to make this argument to the Fourth Circuit in his Petition for Rehearing means that its consideration by this Court is foreclosed. *United States v. Williams*, 112 S.Ct. 1735, 1738 (1992) (question not pressed or passed upon below precludes grant of certiorari); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

For the reasons stated, Respondents R. B. Hazard, Incorporated, Central Fence of CNY, Incorporated, and Thomas DeSantis, Jr. t/a Fence World respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

STEPHEN R. JACKSON
WILLCOX & SAVAGE, P.C.
1800 NationsBank Center
Norfolk, VA 23510
(804) 628-5500

Attorney for Respondent R. B. Hazard, Incorporated

PETER C. MANSON, JR.
TAYLOR & WALKER, P.C.
Post Office Box 3490
Norfolk, VA 23510-3490
(804) 625-7300

Attorney for Respondents Central Fence of CNY, Incorporated and Thomas DeSantis, Jr. t/a Fence World

May 31, 1994

(3)

Supreme Court, U.S.
FILED
JUN 14 1994
OFFICE OF THE CLERK

No. 93-1754

IN THE

Supreme Court of the United States

October Term, 1993

ARDESHIR DANESHMAND

Petitioner/Appellant,

v.

R. B. HAZARD, INC.,

CENTRAL FENCE OF CNY, INC., and

THOMAS DeSANTIS, JR. t/a FENCE WORLD,

Respondents/Appellees.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

REPLY BRIEF

STEPHEN MERRILL, Attorney
2019 Llewellyn Avenue
Norfolk, Virginia 23517
(804) 623-4200

Counsel for Petitioner

No. 93-1754

In The

Supreme Court of the United States

October Term, 1993

ARDESHIR DANESHMAND,

Petitioner,

v.

R.B. HAZARD, INC.,
CENTRAL FENCE OF CNY, INC., and
THOMAS DeSANTIS, JR. t/a FENCE WORLD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

REPLY BRIEF

In their brief, the respondent federal contractors argue that the Due Process and Equal Protection

issued raised by Daneshmand's petition should not be considered by this Court since they were not raised below when Daneshmand moved the Fourth Circuit of Appeals for Reconsideration or alternatively for a Hearing En Banc.

Daneshmand did raise this issue below. In concluding his post-decision motions Daneshmand argued:

> ``Should these motions be denied, Daneshmand will have been through a federal trial and a full review without his case appearing anywhere in published federal jurisprudence. In light of the strength of his case and the monumental legal rulings made in it, that is both suprising and disturbing. From his prospective, it now seems the case falls into a special category; a category where the established law does not apply, but yet remains unchanged. Such a result is the antithesis of justice and

equality before the law.''

This is the very constitutional rationale again argued before this Court.

Further, the nature of this issue precluded raising the point until after the Fourth Circuit opinion in the case had been issued. Daneshmand has no way of predicting that this earth shattering opinion would be issued ``unpublished''. The two cases cited by the respondents in their brief did not involve failure to raise issues in post-decision motions. The criteria for filing such motions are narrow unlike the potential grounds for appeal to this Court. Indeed, such motions need not

even be filed in order to retain the opportunity to appeal for a Writ of Certiorari from this Court.

CONCLUSION

For these reasons also, the Petition for Writ of Certiorari should be granted in this case.

STEPHEN MERRILL
Counsel for the Petitioner

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Reply Brief was mailed to all counsel of record this 15th day of June, 1994.

STEPHEN MERRILL
Counsel for the Petitioner